



POLICE DEPARTMENT

-----X
In the Matter of the Disciplinary Proceedings :
- against - : FINAL
Police Officer Jack Nazaire : ORDER
Tax Registry No. 968662 : OF
Fleet Service Division : DISMISSAL
-----X

Police Officer Jack Nazaire, Tax Registry No. 968662, having been served with written notice, has been tried on written Charges and Specifications numbered 2023-28503, as set forth on form P.D. 468-121, dated May 30, 2023, and after a review of the entire record, Respondent is found Guilty.

Now therefore, pursuant to the powers vested in me by Section 14-115 of the Administrative Code of the City of New York, I hereby DISMISS Police Officer Jack Nazaire from the Police Service of the City of New York.


EDWARD A. CABAN
POLICE COMMISSIONER

EFFECTIVE: 2/27/2024



POLICE DEPARTMENT

February 9, 2024

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In the Matter of the Charges and Specifications	:	Case Nos.
- against -	:	2023-28503
Police Officer Jack Nazaire	:	
Tax Registry No. 968662	:	
Fleet Services Division	:	

-----X

At: Police Headquarters
One Police Plaza
New York, NY 10038

Before: Honorable Vanessa Facio-Lince
Assistant Deputy Commissioner Trials

APPEARANCES:

For the Department: Daniel Maurer, Esq.
Department Advocate's Office
One Police Plaza
New York, NY 10038

For the Respondent: Stuart London, Esq.
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To:

EDWARD A. CABAN
POLICE COMMISSIONER
ONE POLICE PLAZA
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CHARGES AND SPECIFICATIONS

1. Police Officer Jack Nazaire, while assigned to the 28th Precinct, on or about and between April 27, 2023 and April 30, 2023, wrongfully ingested a controlled, banned or prohibited substance, to wit: marijuana and/or cannabinoids without police or medical necessity.

A.G. 304-06, Page 1, Paragraph 1

PROHIBITED CONDUCT
GENERAL REGULATIONS

2. Police Officer Jack Nazaire, while assigned to the 28th Precinct, on or about and between April 27, 2023 and April 30, 2023, wrongfully possessed a controlled, banned or prohibited substance, to wit: marijuana and/or cannabinoids without police or medical necessity.

A.G. 304-06, Page 1, Paragraph 1

PROHIBITED CONDUCT

REPORT AND RECOMMENDATION

The above-named member of the Department appeared before me on December 7 and December 18, 2023. Respondent, through his counsel, entered a plea of Not Guilty to the subject charges. The Department called Police Officer Danny Tse, Dr. Barry Sample and Dr. Joseph Ciuffo as witnesses. Respondent called Russell Honore, Ezra Lewis, Jean Nazaire and Dr. Carl Selavka as witnesses; he also testified on his own behalf. A stenographic transcript of the trial record has been prepared and is available for the Police Commissioner's review. Having evaluated all the evidence in this matter, the Tribunal finds Respondent Guilty of the charged misconduct and recommends that he be dismissed from the Department.¹

¹ This Tribunal was made aware that Respondent formally resigned from the Department on January 22, 2024, before the issuance of this decision. He is no longer a uniformed member of service.

INTRODUCTION

This case involves allegations that Respondent wrongfully used and possessed marijuana, based upon the results of a random drug-screening test. The Department presented evidence that samples of Respondent's urine were subjected to toxicological examination and found to contain the marijuana metabolite Carboxy THC. (Dept Exs. 5 & 14) A sample of Respondent's hair was also collected and tested but produced a negative result for marijuana.

Respondent contested the charged misconduct on the theory that he imprudently exposed himself to excessive secondhand cannabis smoke at a party he attended on April 30, 2023, just hours before he was randomly tested by the Department. He claimed that his passive inhalation of marijuana at the party caused him to test positive and denied ever smoking or ingesting marijuana voluntarily. He presented testimony from friends and his brother, who also attended the same party, as well as expert testimony in support of his defense. Respondent's expert, Dr. Carl Selavka, opined that under very specific conditions of excessive exposure to secondhand cannabis smoke, it is possible for a person to test positive for marijuana if tested close in time to the event. In support of his conclusion, he relied, in part, on a scientific study reported in the Journal of Analytical Toxicology in 2015, which concluded that short-term exposure to high-intensity smoke from cannabis can result in non-smoker inhalation of sufficient amounts of THC to produce positive presumptive urine tests. (Dept. Ex. 8) Dr. Selavka also suggested that Respondent's creatinine level at the time the samples were collected may have altered the results.

Expert testimony presented by the Department Advocate established that Respondent's urine sample submitted to Quest Diagnostics was presumptively positive in the initial screening test using the immunoassay technique. Once the first sample tested positive, a reflex order to perform a confirmatory test was conducted, as is standard procedure. The result of the second

analysis/confirmatory test, which screens using a method known as gas chromatography–mass spectrometry (“GCMS”), was again reported as positive because the concentration was greater than or equal to the administrative cutoff that is applied for testing. (Tr. 50-53; Dept. Ex 5)

For reasons that will be further detailed below, this Tribunal credits the Department’s expert testimony given the facts and evidence presented at trial and rejects Respondent’s defense of passive inhalation. As such, it is the recommendation of the Tribunal that Respondent be found guilty of the charged misconduct and that he be dismissed from the Department.

ANALYSIS

The following is a summary of the facts that are not in dispute.

On April 30, 2023, Respondent, assigned to the 28 precinct, was ordered to appear at the office of the Medical Division, for random drug testing. Respondent was randomly selected to provide both a urine and hair sample. Once collected, the urine sample was sent to Quest Diagnostics and the hair sample to Psychemedics for testing. Respondent’s urine sample tested positive for marijuana, but his hair sample tested negative. Based upon these results, Respondent is charged with wrongfully possessing and ingesting marijuana.

Police Officer Danny Tse, who is assigned to the Drug Screening Unit of the Medical Division testified that he has been collecting urine and hair samples for drug testing from uniformed members of service for the past three years. Respondent signed in to the Medical Division at 8:41 a.m. on April 30, 2023 for random drug screening. (Tr. 33, Dept. Ex. 1) Before retrieving samples from Respondent, Officer Tse followed some routine preliminary procedures. After verifying Respondent’s identity, he asked Respondent to complete the test subject portion of a Medical Division Drug Screening Questionnaire; Members of Service are required to “list any prescription medications during the past three months.” (T. 16-17; Dept. Ex. 1) Respondent

did not report anything in that section. He also did not mention his attendance at a party the night before when speaking with Officer Tse. Prior to going into the testing area, Officer Tse also filled out a Quest Custody Control form. (Dept. Ex. 2) This form includes Respondent's social security number and requires Respondent's signature after the urine sample is collected to verify that the sample was not tampered with in any way and that it was sealed in his presence after collection. After completing the necessary documents, Officer Tse escorted Respondent into a collection room.

Officer Tse testified that he asked Respondent which one he preferred to submit first and he opted to have the hair sample collected first. Thereafter, at 11:00 a.m., a sample of Respondent's urine was collected. (Tr. 34-35) Officer Tse described the procedure for the collection of Respondent's urine as follows. Respondent was escorted by Officer Tse to a urinal with a mirror over it to ensure that the sample was coming from Respondent's body. Respondent was given a cup with a thermometer in it to take the temperature of the urine as a method of certifying, again, that the sample was not being tampered with. Respondent was then instructed to fill two pre-labeled vials (samples A and B) with the urine sample in the cup. Officer Tse subsequently secured the two vials with tamper-evident stickers in Respondent's presence. The sealed vials were then stored until the end of the day when they were packaged and picked up by FedEx to be delivered to Quest Diagnostics for testing. (Tr. 21-27) It is worth noting that neither the procedure for collection of the samples from Respondent nor the chain of custody was contested in this case.

On or about May 2, 2023, Quest Diagnostics laboratory received Respondent's urine samples, upon which a series of tests were performed. (Dept. Ex. 5) The results were entered into a Laboratory Report, generated on May 26, 2023, which detailed that Respondent's urine

specimen tested positive for marijuana on both the initial test and the confirmatory test. (Dept. Exs. 5, 14)

After receiving the above-mentioned results, on May 26, 2023, Dr. Joseph Ciuffo, the Department's Medical Review Officer, reviewed the test results and contacted Respondent. (Tr. 141) Dr. Ciuffo discussed the result of the urine drug test with Respondent and noted that Respondent stated "he does not smoke marijuana, but that he went to a birthday party celebration that day and people were smoking." According to Dr. Ciuffo's testimony, this information was not "clinically significant" to him because he reviewed the drug test results and the "levels of positivity" presented. Dr. Ciuffo testified that Respondent "tested at a level of 28 [nanograms per milliliter] with the cutoff being 15...so the fact that it screened above the cutoff and then confirmed above the cutoff on a different test and it's reported as a 28, the test is a positive test." Given the fact that both the initial screening test performed by Quest on Respondent's urine sample and the subsequent confirmatory test yielded positive results, Dr. Ciuffo had no reason to question the accuracy of the results. He further added "a medical review officer does not consider, in testing, passive inhalation. Because that is not the standard in medical interpretation of test results. That is not an accepted alternative medical explanation." (Tr. 142, 145-46)

Respondent's hair samples submitted to Psychemedics yielded a negative result for marijuana. (Resp. Ex. E) He then had his hair independently tested at Mobile Health Medical Services on May 31, 2023. That test returned a negative result for marijuana (Resp. Ex. G).

Department's Case

Dr. Barry Sample

Dr. Barry Sample was deemed an expert in forensic toxicology and workplace drug testing on consent of all parties. His *curriculum vitae* detailing his educational background,

recognitions and areas of expertise was received in evidence. (Dept. Ex. 4) Although currently retired, Dr. Sample is a consultant who worked for Quest Diagnostics for over 30 years. Among his many duties and responsibilities while employed by Quest Diagnostics, Dr. Sample regularly reviewed and certified laboratory data packages of samples that they tested. (Tr. 41)

Dr. Sample testified, in detail, about the procedures employed when Quest Diagnostics receives urine samples, how the samples are tested and the quality control and assurance measures used to protect the integrity of the process. He further explained that “all these processes, the receipt of the specimen, there’s chain of custody forms that are generated and documented for the specimens. There’s aliquot chain of custody forms that track that aliquot through that aliquoting process, all of the handling for the testing processes and their ultimate disposal.” (Tr. 45)

He then testified about the results related to this case. Dr. Sample stated that in testing for the drugs of abuse, including cocaine, marijuana, opioids, etc., Quest Diagnostics uses an immunoassay technique – a process whereby there is a region that has antibodies that have been developed and directed against the drug or drug metabolite of interest, and those are analyzed on a high-throughput chemistry analyzer. According to Dr. Sample, the purpose of that initial testing is to rapidly eliminate negatives from further consideration. Any specimen that is presumptively positive on that initial test, as was the case with Respondent’s urine sample A, would then be reflexed for confirmatory testing. (Tr. 46) The results of the immunoassay test conducted on Respondent’s urine sample showed that “T 50 was presumptively positive.” Dr. Sample explained that “T 50 stands for the cannabinoid testing, THC testing, at 15 nanograms per milliliter. And any value of one or more is considered to be presumptively positive.” (Tr. 48)

Once there is a presumptive positive, Dr. Sample explained that there is a reflex order to perform confirmatory testing. In essence, the lab goes back to the same sample used for the initial immunoassay test and pulls another sample to test using an analytical technique called gas chromatography–mass spectrometry (GCMS).

Dr. Sample described GCMS as follows:

So it's really a hypertechnology. At least I refer to it that way. It's -- it involves two different analytical techniques, essentially. So you have a gas chromatograph that is used when samples are introduced into that gas chromatograph to separate the components, the constituents in that sample. In time, as it goes through the chromatograph process in -- in the GC, for gas chromatograph. As those constituents exit the gas chromatograph, they enter a mass spectrometer whereas things elute, they're bombarded with high-energy electrons, it causes those components to fragment into different molecular fragments. And the instrument measures, counts the particular fragments of interest and, you know, how many of each fragment that we have. So a combination of the ratio of those various characteristic fragments, as well as the retention time, that is the amount of time it spends in the gas chromatograph before eluting out. That is what comprises the identification. So you can think of, you know, you have a time in the instrument and then that molecular fragmentation that you can pick up in many ways is a molecular fingerprint that definitively identifies the drug or drug metabolite of interest. (Tr. 51-52)

The result of this test was also positive for marijuana. More specifically, the GCMS analysis performed on Respondent's urine Sample A concluded that the presence of Carboxy THC was at or above the administrative cutoff level of 15 ng/ML. Dr. Sample testified that "the concentration measured by the instrument was 28.48." (Tr. 53)

Dr. Sample elucidated that the administrative cutoff level is established by Quest Diagnostics, cleared by the federal government for federal employee testing programs and adopted by the NYPD. He further explained that the scientific basis for setting this cutoff level is the "industry standard." Even though Respondent's urine sample A tested positive for marijuana, that result was not immediately reported to the NYPD Medical Review Officer. The Department has a standing order to test the B specimen immediately if the A specimen is positive.

Hence, only in cases where both the first and second urine samples test positive for Carboxy THC at or above the administrative cutoff does Quest Diagnostics report a positive finding to the Department. (Tr. 54-56)

At trial, Dr. Sample reviewed the laboratory data package produced by Quest Diagnostics for the samples collected from Respondent on April 30, 2023. The package in which Respondent was identified by his donor identification number, showed that the chain of custody remained intact. Respondent's first sample came back from the GCMS analysis indicating the presence of Carboxy THC at a level of 28.48 ng/mL. Respondent's second sample confirmed the presence of Carboxy THC at a level of 24.98 ng/mL. Both samples tested positive at a level above the administrative cutoff, indicating ingestion of marijuana. Dr. Sample characterized the difference between the two samples as scientifically insignificant. (Tr. 56-59)

The Department Advocate questioned Dr. Sample about the fact that Respondent's urine tested positive for marijuana, but his hair sample tested negative and whether in his professional experience, this was an unusual occurrence. Dr. Sample responded: "In the case of marijuana, no, especially marijuana, it is not unusual. Hair detects a pattern of repetitive use. So it takes multiple uses over time in order for a hair specimen to be positive. In the case of urine testing, it detects recent use. So, you know, if it's not a heavy user, they may use it and could be positive for several days and then negative." (Tr. 61)

Dr. Sample was also questioned about Respondent's creatinine level as reported in the Quest Diagnostics report sent to the NYPD's Medical Review Officer (Dept. Ex. 14). Specifically, he was asked what creatinine is and what if any significance the level has with regard to testing for the presence of marijuana in urine. He explained that "Creatinine specifically is a metabolic byproduct of muscle metabolism. And has been long used as an

indicator of whether a specimen is acceptable or -- or may have been diluted, either through in vivo dilution, drinking a lot of fluid, or in vitro dilution, by adding a lot of fluid or some fluid to the urine specimen.” (Tr. 63) He further elaborated that if a person over-hydrates the creatinine level is expected to be lower whereas if a person is dehydrated the creatinine level will be higher. According to Dr. Sample’s testimony a subject’s creatinine level is only reported as an indicator of adulteration of the urine sample but does not play a role in whether a person will test positive for marijuana. (Tr. 64)

The Department Advocate introduced an article from the Journal of Analytical Toxicology published in May 2010 as Department Exhibit 7 and asked Dr. Sample to comment on the results of the study referenced in the article. In this study, the authors studied cannabinoid concentrations in blood and urine after passive exposure to cannabis under real-life conditions. Essentially, subjects were exposed to cannabis smoke for 3 consecutive hours in a well-attended coffee shop in the Netherlands. Urine samples were then collected after 3.5, 6, 14, 36, 60 and 80 hours after initial exposure from the subjects. The samples were subjected to immunoassay screening and analyzed using GSMS. (Dept. Ex 12) Dr. Sample noted that the study concluded that: “while there was detectable levels of the Carboxy THC in the urine specimens, those were all relatively low... none of these maximal concentrations exceeded the 15-nanogram per ML cutoff. And while they did not use an initial test at 50 nanograms per 20 milliliter, they used 25 nanograms per milliliter, many of the specimens were -- were less than that cutoff. And even those that are above the 25 cutoff were just barely above.” (Tr. 78)

In response to increased cannabis potency, another study was conducted years later regarding the effects of secondhand smoke exposure on drug-free participants and reported by the Journal of Analytical Toxicology in 2015. This article was introduced as Department’s

Exhibit 8. The results of this study indicate that under extreme conditions of cannabis smoke exposure, participants can produce positive urine tests at commonly utilized cutoff concentrations. However, "positive tests are likely to be rare, limited to the hours immediately post-exposure, and occur only under environmental circumstances where exposure is obvious." (Dept. Ex 8). Dr. Sample commented on these results and avowed that: "SAMHSA'S position, even after the commissioning of this study, and probably because of the commissioning of this study, is that passive exposure to marijuana or secondhand smoke is not an alternative explanation for having a positive test for marijuana metabolite. And that is true for both the federal employee testing program as well as the DOT's drug testing program for safety, sounds, and transportation employees." (Tr. 83)

On cross-examination, Dr. Sample was asked about the fact that despite Respondent's positive urine test, his hair sample tested negative for marijuana. Dr. Sample asserted that this was not an unusual occurrence. He testified:

It's not necessarily unusual. Some people will try and introduce test results from a different specimen type or results from the same specimen type collected at a different time. But really, all of these results stand on their own. And particularly if you are trying to compare urine and hair, urine detects recent use, hair detects a pattern of repetitive use. And, in fact, specifically with the case of marijuana metabolites, we published a study a number of years ago where we looked at simultaneously collected urine and hair specimens. And I'm -- I'm using some approximate numbers here, so bear with me. But a third of those specimens were -- now I'm talking marijuana now, marijuana metabolite, a third of those specimens were positive in hair only. A third were positive in urine only. And a third were positive in urine and hair. So choose your specimen type and you might miss a third of the positives. (Tr. 104-05)

Dr. Joseph Ciuffo

Dr. Ciuffo was deemed an expert as a primary care physician specializing in family medicine and as a certified medical review officer, on consent of all parties. He testified that he

is this Department's Medical Review Officer. The role of the Medical Review Officer is to review drug-screen results in drug-free workplace testing programs (*Id.*, 139). Dr. Ciuffo, in addition to his role in this Department, serves as a Medical Review Officer for corporations and assists in supervising their drug-free workplace programs, much of which is regulated by the federal government. Dr. Ciuffo is certified to perform this role and must re-certify periodically. (Tr. 135-39)

Dr. Ciuffo examined Department's Exhibit 14 and identified it as the Medical Review Officer's report he prepared addressing Respondent's reported positive drug test. He testified that once Respondent's drug test results were reported, he contacted Respondent by telephone to explore whether there was an explanation for the positive result (Tr. 141). Prior to speaking with Respondent, Dr. Ciuffo reviewed the chain of custody of Respondent's sample to confirm it was intact. He also reviewed the questionnaire filled out by Respondent regarding the ingestion of any potential medications. (Tr. 143) Dr. Ciuffo then spoke with Respondent about the positive test results. Respondent informed him that "[he] does not smoke marijuana [but he] went to a birthday celebration that day and people were smoking." (Tr. 141)

When asked at trial whether this explanation, from a clinical standard, made a difference, Dr. Ciuffo replied: "No. Because I reviewed the drug test result and the levels of the positivity."

(Tr. 142) Dr. Ciuffo elaborated that:

So the member of service in this test tested at a level of 28 with the cutoff being 15. But it had to also be above the 50 on the other scientific technique before it goes on to confirmation. So it must be above the 50, then it goes on to be -- if it was below the 50, it would be reported to me negative. Then it has to go on to be mass spectrometry, and then it has to be above 15. If it was below 15 on that test, it would have been reported to me as negative. So the fact that it screened above the cutoff and then confirmed above the cutoff on a different test and it's reported as a 28, the test is a positive test. (Tr. 144-45)

Dr. Ciuffo testified that the fact that Respondent reported attending a party where people were smoking marijuana did not affect his clinical opinion as a physician or as a Medical Review Officer. He further expounded that “a medical review officer does not consider, in testing, passive inhalation. Because that is not the standard in medical interpretation of test results. That is not an accepted alternative medical explanation.” (Tr. 146)

At trial, Dr. Ciuffo was also questioned about Respondent’s creatinine levels and the potential that he was dehydrated at the time of the samples were collected. First, Dr. Ciuffo described what creatinine is and its main significance in drug testing. He then testified that if in fact there was a connotation that the sample was diluted based upon the creatinine levels, the results would be reported as a negative with a low creatinine. (Tr. 147) If that had been the case, the Medical Review Officer would have to suggest a re-collection of the specimen due to a potential false negative. However, the converse is not true, according to Dr. Ciuffo’s testimony. A spot urine analysis such as this one cannot determine if a person is dehydrated. Dehydration would be determined by a blood test or other clinical signs of dehydration. In a clinical setting, creatinine levels are not used as a determinant of dehydration. (Tr. 148-49)

On cross-examination, Dr. Ciuffo conceded that it was possible for secondhand cannabis smoke to be detected in a urine sample. However, he testified that even under the circumstances that Respondent was allegedly exposed to (contact with heavy cannabis smoke in an area with poor ventilation, and providing a urine sample approximately six hours after said exposure), it would be highly improbable that he would test positive passed upon passive inhalation. Dr. Ciuffo qualified his statement by reiterating: “Because the cutoff is set for that reason. To establish who smokes from who doesn't smoke. And the passive inhalation argument is not accepted in drug testing, in drug-free workplace testing for this -- for those reasons.” (Tr. 156)

He again acquiesced that scientific studies have shown that a person can have detectable levels of marijuana in their body due to passive inhalation under extreme conditions, but not to the extent that it would be over the immunoassay cutoff of 50 and then over the GCMS level of 15. (Tr. 157-58)

Respondent's Case*Respondent*

At trial, Respondent testified that prior to becoming a police officer he held other jobs that required workplace drug testing and he has never tested positive for any drug until now. He stated that he does not smoke marijuana, cigarettes or hookah and has never done any drugs. He acknowledged that the Department requires him to be drug-free and he is expected to be "level-headed" given his interaction with the public. (Tr. 285)

Respondent testified that he attended a party on April 30, 2023 for his friend Joshua. He recalled arriving at the party at approximately 1:30 a.m. He and his friends reserved a section around a high top table at the Tropical Breeze venue in Brooklyn. Respondent described the venue as "extremely crowded" and he estimated that there were between 500-600 people there that night. He also recalled that there was both hookah and marijuana being smoked all around him. Additionally, Respondent stated that some people at his table including his brother Jean, and Joshua were smoking marijuana in close proximity to him. When asked on direct examination, if he was familiar with NYPD's zero tolerance policy regarding marijuana, he acknowledged being aware of it. He was then asked why he would remain in a place where marijuana was being smoked and he recognized that it was "poor judgment" on his part but that he wanted to show his friend Joshua "support" for his birthday. He did not think that he could test positive by remaining at the party. (Tr. 286-90)

According to his testimony, Respondent remained at the party for about three to four hours. He testified that he got a drink, but the place was so crowded that someone bumped it out of his hand. He also stated that he was unable to drink water or juice because “everybody was so thirsty... that there was nothing left for me at the table.” Respondent further testified that during his routine physical exam he has been counseled by his doctor to drink more water because he dehydrates a lot. Despite this medical advice, Respondent admitted that he consumes very little water and food. He added that sometimes he only eats one meal in a day because he is too busy at work to eat. (Tr. 290-92)

On cross-examination, Respondent testified that during the time he spent at the venue exposed to marijuana smoke, he did not feel the effects of marijuana. He also clarified that he did not receive a specific medical diagnosis from his physician regarding his hydration, but that he was advised that he needs more water because his “water level in [his] body is very low.” (Tr. 306) Respondent admitted that he did not provide this information to Dr. Ciuffo at the time of their phone conversation, however.

Respondent described the level of smoke at the venue on the night in question. He stated that it was “very high [and] very toxic.” He recalled that it was hot and he was sweating. Respondent stated that there was no air conditioning or ventilation. (Tr. 294-95)

Respondent testified that he left the party at approximately 5:00 a.m. and reported to work at 7:05 a.m. He asserted that he was not high nor did he feel any of the effects typically associated with the ingestion of marijuana. In fact, he testified that he felt fine enough to drive home after the party and then drive to work that morning for his tour of duty. That same morning, upon arriving at his command, the desk sergeant informed him that he had to appear for random drug testing. Respondent testified that he did not try to adjourn it because he was not concerned about the

test. He arrived at the Medical Division at approximately 805. Respondent filled out the questionnaire and then samples of his hair and urine were collected. (Tr. 295-96) He also confirmed that although he arrived at the Medical Division at approximately 8:00 a.m., his urine sample was not collected until approximately 11:00 a.m. (Tr. 311-12)

Respondent testified that at some point after he submitted samples for testing, he received a phone call from the medical review officer informing him that he tested positive for marijuana. He replied that he does not smoke marijuana and then informed the medical review officer that he attended an event where people were smoking marijuana. At the conclusion of his direct examination, Respondent reiterated that he has never knowingly ingested marijuana in any form and apart from these charges, he has never been accused of misconduct as an officer. (Tr. 298-99)

Fact Witnesses

Respondent presented the testimony of three fact witnesses; his two friends, Russell Honore and Ezra Lewis, and his brother, Jean Nazaire, all of whom attended the same party on April 30, 2023. Russell Honore and Ezra Lewis identified themselves as friends of Respondent for the past 30 years. (Tr. 181, 202) They all testified that they attended a birthday celebration for a friend named Joshua on April 30, 2023 at a venue called Tropical Breeze in Brooklyn. (Tr. 181, 203, 222) Each of the fact witnesses described the venue that evening as very crowded and smoky due to the many patrons smoking hookah and marijuana. (Tr. 183, 205, 287-88) They also attested that the venue had poor ventilation and that the air conditioning was not operable that night. (Tr. 184, 191, 204, 227)

Respondent's counsel showed each of the three witnesses short video recordings (Resp. Exs. A, B and C) that they all agreed accurately depicted the conditions inside the Tropical

Breeze on the night in question. (Tr. 185) The video corroborated the witnesses' testimony in that the venue appeared crowded and smoky.

Each of the witnesses testified that they arrived and left the Tropical Breeze separate from Respondent but that Respondent was with them, in a reserved section of the venue with a group of approximately eight to ten friends. Mr. Honore testified that he was smoking hookah that night and to the best of his recollection there were at least three people at their table smoking marijuana in close proximity to Respondent. (Tr. 184-185, 199) According to Mr. Lewis and Mr. Nazaire's testimony, Respondent did not smoke anything at the party on April 30, 2023 and they both asserted that they have never seen Respondent use marijuana. (Tr. 207, 213, 227)

Dr. Carl Selavka

Respondent called Dr. Carl Selavka as an expert witness. Dr. Selavka has been forensic toxicologist for about 35 years with extensive experience in toxicology. In regards to workplace drug testing, Dr. Selavka described himself as "one of the 80 to 100 inspectors that oversee the accreditation, or the accreditable standard of workplace testing of employees, under the substance abuse and mental health service." (Tr. 240) Without objection, Dr. Selavka was deemed an expert in the area of workplace drug testing.

At trial, Dr. Selavka testified that he was retained by the defense to review materials in connection with Respondent's drug testing results. Specifically, he reviewed both the A sample and B sample urinalysis results by Quest Laboratory, as well as the hair drug testing results by Psychemedics, and the hair drug testing result by Mobile Health. He also had an opportunity to review scholarly articles referencing both the creatinine levels and the exposures related to marijuana absorption from external sources that may be involved in this particular matter. (Tr.

241) In addition, Dr. Selavka viewed Respondent's Exhibits A, B and C - short video clips from inside the Tropical Breeze on April 30, 2023.

Initially, Dr. Selavka testified about Respondent's negative hair test results. He commented on the significance of the negative results from the hair samples saying:

The importance is, the sample of hair collected on the 30 of April that is the same date the collection of urine samples in this case, that shows the negative from Psychemedics, whereas 24 days later, yet again had a negative, presumptive negative finding for another hair. And the time period is important in the difference between the two hair collections in that, the underarm hair is cut at the skin line, it's not pulled out of your body. The hair collected from the underarm for the sample tested by Psychemedics would represent the time period roughly 10 to 14 days prior to the collection date of the 30 of April because the days after that, leading up to the date of collection is still inside the body. So that particular hair collection for the Psychemedics testing would not have represented the time period of exposure by the officer at this party, whereas, the subsequently collected hair that was tested by Mobile Health would include that exposure period, and here again, it's negative. (Tr. 243-44)

Dr. Selavka then testified about the importance of creatinine levels. While he agreed with Dr. Sample that creatinine levels are used to test the integrity of collection biomarkers, Dr. Selavka asserted that toxicologists also use the creatinine value to evaluate, as in this case, the truthfulness of the scenario presented by Respondent that may have been the cause for the unknowing ingestion of marijuana. Dr. Selavka further opined that given this Respondent's weight, had he hypothetically consumed three, eight-ounce glasses of water he may have moved his creatinine from the 200 milligram per deciliter range to the 100 to 75 milligrams per deciliter range. According to Dr. Selavka's testimony, with that level of dilution Respondent probably would have been detected as a presumptive negative on the urine screening test. (Tr. 247)²

² In anticipation of Respondent's expert testimony, the Department presented rebuttal evidence through Dr. Sample's testimony regarding the effects, if any, of creatinine levels on drug-screening results. In addition to Dr. Sample's testimony, the Department Advocate introduced several scholarly articles in evidence (Dept. Exs. 10, 11 and 12) regarding scientific research conducted about creatinine concentrations and urine screening for marijuana. Department's Exhibits 10 and 11 both concluded that creatinine level is an important indicator of urinary specimen dilution and that excessive fluid intake can substantially dilute urinary drug concentrations thereby affecting the number of laboratory-positive results and/or produce false-negative reports for drug users. The article, titled *Urinary Creatinine Concentrations in the U.S. Population: Implications for Urinary Biologic Monitoring Measurements*,

Dr. Selavka was asked his opinion with regard to secondhand exposure to marijuana smoke and its effect on a urine drug test. He described the major factors that contribute to the detectability of a drug in urine including whether a substance was ingested or whether a person was subject to high levels of exposure, when the person was exposed in relation to the time the sample was collected and the person's creatinine level at the time of collection. (Tr. 251-52) Using the above-mentioned criteria as well as a visual inspection of the videos from the night in question, Dr. Selavka determined that Respondent was "exposed to secondhand smoke in a volume and in a time period that could have given rise to the findings in this case." (Tr. 253)

Dr. Selavka also testified about the cutoff levels utilized by laboratories for drug testing. He explained that cutoff levels are meant to provide consistency in workplace drug testing. It also allows laboratories to apply accreditation standards consistently, so that a laboratory that is performing up to the laboratory practices of an industry are being measured fairly. (Tr. 258)

On direct examination, Dr. Selavka was asked if a subject tests above the cutoff level does it mean it is based on ingestion. Dr. Selavka responded: "It's based on ingestion, the difference is knowing versus unknowing. Ingestion cannot be differentiated for a gentleman who is so close to the cutoff and is dehydrated, as in this case, knowing that exposure to having cannabis smoke for hours at a time just prior to collection could be the source of this finding." (Tr. 259)

During cross examination, Dr. Selavka was questioned about the data litigation package related to the hair sample tested by Psychemedics. Dr. Selavka conceded that although there was

submitted as Dept. Ex. 12 explained that found that creatinine levels vary among different age groups, ethnic and racial backgrounds and the time of day that a specimen is collected. Of particular relevance to this case, the study revealed that "non-Hispanic blacks had significantly greater concentrations of urinary creatinine than did all other racial/ethnic groups across all age groups." Dr. Sample reviewed and commented upon each of the above-mentioned articles, but it did not alter his opinion regarding creatinine levels and their effect on drug-screening results.

no indication that there was marijuana presented at a detectable level on the hair sample tested by Psychemedics, that does not mean that Respondent did not voluntarily, knowingly, and deliberately use marijuana “on a single or few occasions.” (Tr. 268)

Similarly, with respect to the Mobile Health hair test results, Dr. Selavka admitted that because there was no data litigation package that accompanied the results there was nothing for him to examine which would have led him to the conclusion as to whether or not there were detectable amounts of marijuana in Respondent’s system. He explained that “If we did have a data package related to the hair collected by Mobile Health, I could have evaluated the semi-quantitative finding for the marijuana metabolite screening test for this particular sample.” (Tr. 272) Essentially, the conclusion that Dr. Selavka could have drawn from the hair sample tested by Mobile Health if he did have a data package was that Respondent was not a habitual user of marijuana.

Specification 1: *Wrongful Ingestion of Marijuana*

Respondent is charged with possessing and ingesting marijuana without police necessity or authority after a random drug test revealed the presence of marijuana in the urine samples collected by the Department. After evaluating the testimony and evidence presented at the hearing and assessing the credibility of witnesses, this tribunal finds that the preponderance of the credible evidence established that Respondent wrongfully ingested marijuana on or about and between April 27, 2023 and April 30, 2023. The Department Advocate adequately proved the integrity of the sample collection process that the chain of custody was not compromised and that Respondent’s sample was accurately tested using a New York State licensed and FDA cleared laboratory.

I credit the testimony of Police Officer Tse, who collected Respondent’s urine and hair samples, packaged them, and sent them to the Quest and Psychemedics Laboratories for forensic

testing. Quest tested Respondent's "A" and "B" samples, and both tested positive marijuana above the administrative cut-offs. I also credit Dr. Barry Sample's testimony as to the method by which Quest determined that Respondent's urine sample contained Carboxy THC at a concentration above the administrative cutoff level. I further find Quest's testing regimen and laboratory procedures are reliable and generally accepted in the scientific community.

First, it should be noted that urine testing has been held reliable by New York State courts and by this tribunal in establishing an officer's use of illegal drugs. As such, the onus is on Respondent "to present convincing and sufficiently detailed evidence supporting his argument that [his] positive test result was the result of innocent ingestion or exposure." See *Disciplinary Case No. 2017-16897* (June 21, 2018), citing *Disciplinary Case No. 2016-15832* (Feb. 16, 2018); *Fire Dept v. Simpkins*, OATH Index No. 2308/14 (Dec. 11, 2014) ("Respondent bears the burden of proving an affirmative defense of innocent ingestion by a preponderance of the evidence."), citing *Fire Dep'tv. Rolling*, OATH Index No. 1615/11 at 4 (Sept. 23, 2011), adopted, Comm'r Dec. (Oct. 31, 2011), affd, NYC Civ. Serv. Comm'n Item No. CD 12-26-A (May 22, 2012); *Dep't of Correction v. Gaskin*, OATH Index No. 1459/13 (Sept. 13, 2013), affd, NYC Civ. Serv. Comm'n Case No. 2013-0243 (Apr. 14, 2014) ("The burden is on respondent to prove innocent or unknowing ingestion of an illegal drug by a preponderance of the evidence."), citing *Green v. Sielaff*, 198 A.D.2d 113 (1st Dep't 1993).

Respondent argued that the positive test results reflect his unknowing ingestion via passive inhalation of cannabis smoke at a party he attended. Respondent did not, however, disclose his attendance at a party on April 30, 2023 on his drug-screening questionnaire. In fact, it was not until the interview conducted by Dr. Ciuffo after his "laboratory positive" was

reported that Respondent offered his exposure to secondhand marijuana smoke as an alternative explanation for his test result.

Respondent's theory of inadvertent, passive exposure is, by nature, highly speculative. In support of his theory, Respondent offered expert testimony from Dr. Carl Selavka who suggested that inadvertent inhalation of marijuana smoke could cause detectable levels of marijuana in urine results. Dr. Selavka also relied upon the conclusions of a study conducted in 2015 (Dept. Ex. 8) to explain why Respondent tested positive for marijuana in his urinalysis. This study exposed participants to high intensity, secondhand, cannabis smoke in a poorly ventilated environment for a few consecutive hours and then tested the participants' urine at varying intervals from the initial time of exposure. The findings were that "short-term exposure to high intensity smoke from combusted cannabis resulted in non-smoker inhalation of sufficient amounts of THC to produce positive presumptive urine tests by immunoassay with a 20 ng/ml cutoff concentration." (Dept. Ex. 8). Notably, however, SAMSHA's Mandatory Guidelines for Federal Workplace Testing (Dept. Ex. 9) which are adopted by the Department, use a higher initial test cutoff concentration than that which was used in the above-mentioned study.

Dr. Selavka's assertion that Respondent's positive results might be the outcome of passive exposure to marijuana at a party he attended also required his reliance on Respondent's version of the ventilation and cannabis smoke conditions on the night in question. Respondent presented the testimony of three fact witnesses, whom attended the party at the Tropical Breeze with Respondent on April 30, 2023. Preliminarily, it is worth noting that the witnesses who testified on Respondent's behalf are his friends of 30 years and his biological brother, all of who are presumptively biased in favor of Respondent, despite their apparent sincerity at the trial. While I do not doubt the veracity of Respondent and the other three witnesses' testimony

regarding the smoky conditions at the party they attended at the Tropical Breeze on April 30, 2023, as it is corroborated by the video evidence submitted, a definitive conclusion cannot be drawn that the conditions at the venue that night sufficiently mimicked those present in study that was the subject of the article submitted as Department's Exhibit 8. This Tribunal found the testimony of Respondent's fact witnesses speculative and of limited probative value.

This Tribunal was also unpersuaded by Respondent's expert's testimony regarding creatinine levels effect on drug-screening results. Firstly, there was no medical evidence to support the inference that Respondent was dehydrated on the date his urine sample was collected. Dr. Ciuffo credibly testified that dehydration cannot be medically determined simply by Respondent's analyzing Respondent's creatinine levels. Moreover, as the scientific articles submitted by the Department Advocate demonstrate and Dr. Sample's testimony corroborated, creatinine is used as an indicator of whether a specimen has been adulterated. Essentially, if as Dr. Selavka suggested, Respondent had drank more water prior to his urine collection, the only change would have been that his creatinine levels decreased and the sample measured as diluted yielding a potential false negative result.

Based on the totality of the evidence in the record, Respondent cannot point to any credible evidence to support the proposition that the positive urine test results were reflective of his exposure to secondhand cannabis smoke. Ultimately, Dr. Sample's explanation of his confidence in Quest's ability to distinguish between ingestion and contamination from inadvertent exposure based upon the administrative cutoffs employed in testing, was more convincing and supported by the scientific evidence in the record. In the absence of compelling proof countering the reliability of the Quest results, those results stand.

For all of the reasons set forth above, the tribunal finds Respondent Guilty of wrongful ingestion of marijuana.

Specification 2: Wrongful Possession of Marijuana

I find the Department Advocate has met his burden of proof by a preponderance of the credible, relevant evidence that Respondent wrongfully possessed marijuana between April 27, 2023 and April 30, 2023.

I incorporate all of the findings of fact made above in my analysis of the evidence relevant to Specification 1. Because I have found that Respondent ingested marijuana from April 27, 2023 and April 30, 2023, he would also have had to possess marijuana *a priori* at some point during the same period.

Accordingly, I find Respondent Guilty of Specification 2.

PENALTY

In order to determine an appropriate penalty, this Tribunal, guided by the Department's Disciplinary System Penalty Guidelines, considered all relevant facts and circumstances, including potential aggravating and mitigating factors established in the record. Respondent's employment history was also examined. *See* 38 RCNY § 15-07. Information from his personnel record that was considered in making this penalty recommendation is contained in an attached memorandum.

Respondent, who was appointed to the Department on October 7, 2019, has been found guilty of wrongfully ingesting and possessing marijuana. The Department has recommended termination, and I concur.

The presumptive penalty for a random drug-screening test showing positive for marijuana is termination; there is no mitigated penalty. Although I recognize that recreational marijuana use

is legal in New York, the Department strictly prohibits uniformed members of service from partaking in any form of drug use on or off-duty.

Moreover, SAMHSA's guidance for Federal Workplace Drug Testing Programs, which the Department follows, does not accept passive exposure to a drug (e.g. secondhand marijuana smoke) as a legitimate medical explanation for a positive test result under its Mandatory Guidelines. While prolonged exposure to high levels of second-hand marijuana smoke *may* result in detectable levels of THC in the urine, the willful and sustained exposure to extreme levels of secondhand marijuana smoke may be considered a form of active use according to the same guidance.

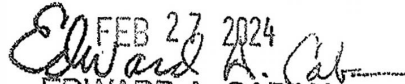
The Department maintains a strong interest in not employing persons who ingest and possess marijuana. Permitting Respondent to continue his employment is discordant with good order and discipline in the force. This Tribunal was made aware that Respondent formally resigned from the New York City Police Department after the conclusion of this trial; the recommendation of termination, however, is nonetheless warranted. Accordingly, I recommend that Respondent be DISMISSED from this Department.

Respectfully submitted,



Vanessa Facio-Lince
Assistant Deputy Commissioner Trials

APPROVED

FEB 27 2024

EDWARD A. CABAN
POLICE COMMISSIONER



POLICE DEPARTMENT CITY OF NEW YORK

From: Assistant Deputy Commissioner – Trials

To: Police Commissioner

Subject: SUMMARY OF EMPLOYMENT RECORD
POLICE OFFICER JACK NAZAIRE
TAX REGISTRY NO. 968662
DISCIPLINARY CASE NO. 2023-28503

Respondent was appointed as a Police Officer on October 7, 2019, after serving as a Traffic Enforcement Agent from February 26, 2013 through October 6, 2019. On his most recent annual performance evaluations, he was rated “Exceeds Expectations” for 2021 and 2022.

Respondent has no disciplinary history. In connection with the instant matter, he was suspended without pay from May 26, 2023 to June 25, 2023, and was placed on Level 2 Discipline Monitoring in August 2023. Monitoring remains ongoing.

For your consideration.

Vanessa Facio-Lince
Assistant Deputy Commissioner Trials